In the Supreme Court of the United States

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CLERK

OCTOBER TERM, 1939

No. [redacted] 80

JULIUS G. BRASHEAR, CHARLES E. GRIGGS and MRS. CHARLES E. GRIGGS, his wife, in their own behalf and in behalf of others similarly situated, and HARRY W. HILL, Receiver of Intermountain Building & Loan Association, a corporation, successor to Henry S. McCluskey, and George A. Mauk, Receivers of Intermountain Building & Loan Association, a corporation,

Petitioners,

vs.

INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, a corporation, CHARLES G. JOHNSON, State Treasurer of California, and JUSTUS E. CRAEMER, Building and Loan Commissioner of California,

Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI
and
SUPPORTING BRIEF AND APPENDIX

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Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

The petitioners, Julius G. Brashear, Charles E. Griggs and Mrs. Charles E. Griggs, his wife (in their own behalf and in behalf of others similarly situated), and Harry W. Hill, Receiver of Intermountain Building & Loan Association, an Utah corporation, by Thomas W. Nealon and Alexander B. Baker, their respective attorneys, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit (R. 1147, Vol. III), which modified and, as modified, affirmed a judgment and decree of the District Court of the United States for the Southern District of California, Central Division, refusing to appoint an ancillary receiver in aid of the primary receivership and dissolving a temporary restraining order under which the Building and Loan Commissioner of California was theretofore restrained from liquidating and distributing cash and bonds on deposit in California in disregard of the contract lien rights of petitioners and others similarly situated, who alleged the cash and bonds were deposited by Intermountain Building & Loan Association while it was insolvent, and in breach of an express trust theretofore existing in their favor.

OPINION OF THE COURT BELOW

The Circuit Court of Appeals rendered an opinion which is reported in 109 Fed. (2d) 857-863.

JURISDICTION

This Court has jurisdiction to review the judgment and decree as rendered below, under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938), and under Rule 38 of the Revised Rules of this Court which became effective February 27, 1939. The date of the judgment and decree of the Circuit Court of Appeals sought to be reviewed is February 20, 1940. Motion for rehearing was filed in the Circuit Court of Appeals on March 20, 1940, and denied on April 9, 1940. An order was made staying issuance of mandate to and including May 31, 1940.

CONSTITUTION AND STATUTES INVOLVED

The constitutional provisions and statutes involved are Article IV, Sections 1 and 2, and the Fourteenth Amendment, of the Constitution of the United States, as well as California Statutes of 1931, p. 843, and Statutes of 1935, p. 1507, known as the Building and Loan Association Act. The pertinent California Code provisions are set forth in an Appendix, infra, at pages i to ix.

SUMMARY STATEMENT OF MATTER INVOLVED

On April 18, 1933, Guadalupe R. Gallegos and certain investors in Intermountain Building & Loan Association, commenced a class action in the District

Court of the United States for the District of Arizona, charging the Association with breach of trust, mismanagement and insolvency and praying for the appointment of a receiver (R. 764-796).

Intermountain Building & Loan Association is an Utah corporation incorporated November 16, 1920 (R. 470). The Association sold its certificates and transacted a building and loan business in Utah, Arizona, Colorado, Oregon, Idaho, Wyoming, California and the Dominion of Canada. Its maximum paid in capital did not exceed $3,460.00 (R. 368). The preponderating number and monetary value (R. 398) of certificates so issued and sold contained the following recital (R. 769-770):

> "SECURITY.
>
> As security for the performance of obligations of the Association hereunder, the Association will hold intact, subject to the constant examination and inspection of the banking department of the State of Utah first mortgages on improved Real Estate, in an amount equal to at least 100% of its liabilities hereunder, less the amount of any loans made on this and like certificates or any certificates issued in lieu thereof."

(hereinafter referred to as the "security clause").

In April of 1927 the Association, desiring to transact business in California (R. 571), placed a fifty-thousand dollar time certificate of deposit with the Building and Loan Commissioner of that state, receiving its license on April 25, 1927 (R. 697). This time

certificate of deposit was later withdrawn and notes secured by real property mortgages were substituted. On August 13, 1931, the California Building and Loan Commissioner demanded that the Association immediately increase the guaranty deposit by another fifty thousand dollars (R. 703, 705). After receiving a threatening telegram from the Commissioner (R. 705) the Association deposited an additional fifty thousand dollars (R. 707). Prior to applying for the California license the Association had sold $48,161.80 of its certificates in that state (R. 313).

A year later in such suit the Arizona court appointed a receiver pendente lite (R. 476), and on February 8, 1936, made the receiver's appointment permanent (R. 477-478), finding at that time that the Association was insolvent by more than four hundred thousand dollars (R. 517), and that such insolvency had existed for more than seven years (R. 517-518). In this class action the court found that at all times since incorporation all assets of the Association constituted a trust fund for investors whose certificates contained a security clause and that the Association had at all times been the trustee for such investors (R. 526-527). The court impressed an equitable lien upon all assets of the Association wheresoever situated (R. 530-531) and adjudged that the title thereto of the Receiver related back to April 18, 1933, when the bill was filed (R. 534).

On March 29, 1934, the California Building and Loan Commissioner seized the securities previously

deposited by the Association with the State Treasurer (R. 559, 713-714).

On August 21, 1935, the Building and Loan Commissioner of California commenced a proceeding in the Superior Court of Los Angeles County asking instructions for distribution of the funds he had seized (R. 711-743). Neither the Association nor its previously appointed receiver appeared in the California proceeding. On December 28, 1935, the Superior Court of Los Angeles County entered its order directing distribution of the guaranty fund exclusively to those who were residents of California within the meaning of the State Act (R. 755-759).

Seeking to enjoin the California Treasurer as Building and Loan Commissioner from a preferential distribution to California investors to the exclusion of others similarly situated, petitioners commenced an action on February 27, 1936, in the District Court of the United States for the Southern District of California, Central Division, alleging that the California Building and Loan Association Act insofar as it required an exclusive distribution of assets to California investors was unconstitutional, and inadequate, and further alleging that when the securities were deposited by the Association with the California officials the Association was insolvent and such securities were received with that knowledge. The Bill of Complaint further alleged that the securities deposited by the Association in California had been purchased with funds which the Association held in trust for the con-

tract lien-holding creditors and that such contract lien-holding creditors had and asserted liens thereon paramount to claims of general creditors (R. 2-43). A temporary restraining order was issued on the Bill of Complaint (R. 43-45) and the same remained in force until dissolved upon final judgment (R. 174).

The trial court found that the California Building and Loan Association Act was valid and constitutional and that when the Association deposited its securities in California it was solvent and that the Building and Loan Commissioner of that State had no reason to believe otherwise, and that the Association after making the two $50,000 deposits still held intact without resort to the funds and securities so deposited, first mortgages on improved real estate in an amount in excess of one hundred per cent of its liability upon those certificates containing the security clause, after deducting the amount of loans outstanding against such certificates (R. 149-153). As a matter of law, the trial court concluded that the deposits of cash and securities were legal and valid, and not subject to any prior trust or encumbrance and that the California Building and Loan Commissioner was entitled to liquidate and distribute the same for the benefit of California investors (R. 153-154). To the findings and conclusions of law in question timely and adequate objections were made, overruled and exceptions allowed (R. 154, 172). The Circuit Court of Appeals modified the judgment and decree to the extent that it held that such findings of fact and conclusions of law were unnecessary and at the same time declining

to determine whether they were correct or erroneous. As so modified the decree was affirmed. (*Brashear v. Intermountain Building & Loan Association* (C.C.A. 9), 109 Fed. (2d) 857-863)

The principal questions presented, therefore, are:

(1) Are the findings of fact, conclusions of law and decree as made by the United States District Court for the District of Arizona in the original class suit with respect to the period over which the Association was insolvent, the right and title of the receiver to the assets and the trust character thereof, res judicata as to the California investors and their privies, and hence entitled in California to full faith and credit under Article IV of the Constitution of the United States?

(2) Were petitioners entitled to a determination of whether the California Building and Loan Act is unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States on the basis that it abridges their privileges as investors in the Association and impairs the obligations of their several contracts and deprives them of their property without due process of law?

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in deciding that the final decree entered in the case of *Gallegos v. Intermountain Building & Loan Association,* together with the findings of fact and conclusions of law therein

were not res judicata or otherwise binding upon appellees as to their rights or the rights of the California investors whom they represented with respect to the distribution of the guaranty fund and other assets located in California, for the reason that said findings of fact, conclusions of law and final decree were made and entered in a class suit in which all parties were before the court by way of representation and after answer had been filed to the merits by th Association from which no appeal had been taken and hence said proceedings had become res judicata and entitled to full faith and credit under the provisions of Article IV of the Constitution of the United States.

2. The Circuit Court of Appeals erred in deciding that it was unnecessary to determine whether or not the California Building and Loan Association Act was constitutional insofar as it affected the rights of petitioners and those whom they represent for the reason that prior to the commencement of the action in the District Court of the United States for the Southern District of California, Central Division, the Building and Loan Commissioner of California had obtained an order from the Superior Court of Los Angeles County directing a preferential distribution of the guaranty fund to California investors, to which proceeding petitioners and those whom they represented were not a party and hence were deprived of their day in court and thus were remitted to the courts of the United States for preservation and enforcement of their right and remedy.

3. The Circuit Court of Appeals erred in deciding that it was unnecessary for it to determine whether or not the Building and Loan Association Act of California was in violation of the Fourteenth Amendment to the Constitution of the United States as being an impairment of the contract lien rights of those investors in the Association who resided without the State of California, for the reason that prior to the commencement of the action in the District Court of the United States for the Southern District of California, Central Division, the Building and Loan Commissioner of California had obtained an order from the Superior Court of Los Angeles County directing a preferential distribution of the guaranty fund to California investors, to which proceeding petitioners and those whom they represented were not a party and hence were deprived of their day in court and thus were remitted to the courts of the United States for preservation and enforcement of their right and remedy.

REASONS RELIED ON FOR GRANTING WRIT

Point A:

In holding that the final decree, findings of fact and conclusions of law as made by the United States District Court for the District of Arizona in the case of *Gallegos v. Intermountain Building & Loan Association* were not binding upon or res judicata as to California investors, and their privies, namely, the Building and Loan Commissioner and the State Treasurer, —the Circuit Court of Appeals has decided an import-

ant question of Federal law in a way probably not in accord with applicable decisions of this Court.

Point B:

In holding that it was unnecessary to determine the truth or falsity of the allegations in petitioner's pleadings to the effect that the securities on deposit in California represented the fruits of trust funds belonging to petitioners and that petitioners were entitled to a return or distribution of the securities to satisfy their existing contract liens, the Circuit Court of Appeals has decided an important question of Federal law which appears not to have been and should be settled by this Court.

Point C:

In holding that it was unnecessary to determine whether or not the Building and Loan Association Act of California violated the Fourteenth Amendment to the Constitution of the United States and impaired the contract lien rights of those investors who were not residents of California, the Circuit Court of Appeals has decided an important question of Federal law probably in conflict with applicable decisions of this Court.

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Attorneys for Petitioners.

LOUIS B. WHITNEY,
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Respondents.

Brief in Support of Petition for Writ of Certiorari

POINT A

In holding that the final decree, findings of fact and conclusions of law as made by the United States District Court for the District of Arizona in the case of *Gallegos v. Intermountain Building & Loan Association* were not binding upon or res judicata as to California investors, and their privies, namely, the Building and Loan Commissioner and the State Treasurer,—the Circuit Court of Appeals has decided an important question of Federal law in a way probably not in accord with applicable decisions of this Court.

In the class suit commenced in the United States District Court for the District of Arizona by Gallegos and others similarly situated, against Intermountain Building & Loan Association, personal service was had upon the latter and it answered to the merits. All investors in the Association wheresoever situate were thus brought before the court by way of representation. The District Court found that the security clause contained in the certificates of Gallegos and all other investors similarly situated created a contract lien upon the assets of the Association (R. 515, 516) and concluded as a matter of law that the assets of the Association wherever situated belonged in the possession of the Receiver (R. 524-525) and that from the date of the creation of the Association, its assets and properties and the proceeds thereof were a trust for the purpose of securing the obligations of the Association under such contract liens, and that the Association was a trustee for its lien-holding creditors (R. 526-527). In the final decree so rendered in this

original class suit the District Court of Arizona established a contract lien on all assets of the Association wherever situate, adjudging that they belonged in the possession of the Receiver (R. 535-31), and that the corporation was the trustee for all of such lien-holding creditors (R. 533). The court further adjudged that the rights and title of the Receiver related back to April 18, 1933 (R. 534). From these findings of fact, conclusions of law and final decree no appeal was taken and the same has become final.

We submit that all contract lien-holding creditors, necessarily inclusive of California investors, were before the District Court of Arizona for a determination of their rights to all assets of the Association. The several thousand creditors of the Association (R. 398) had a common interest in the common funds. The rule is clear that a decree rendered in a class suit or suit by way of representation binds all within the class wherever residing and regardless of the fact that they were not specifically named as parties to the suit. (*Hartford Livestock Insurance Co. v. Ibs,* 237 U. S. 662, 35 S. Ct. 693; *Supreme Counsel, etc. v. Green,* 237 U. S. 531, 59 L. Ed. 1087; *Sovereign Camp of Woodmen of the World v. Bolin,* 83 L. Ed. 58; *Smith v. Swormstedt,* 16 How. 288, 303, 14 L. Ed. 948; *Supreme Tribe of Ben Hur v. Cauble,* 255 U. S. 356, 65 L. Ed. 673; *U. S. v. Old Settlers,* 148 U. S. 427, 480, 13 Sup. Ct. 650; *Sprague v. Ticonic Natl. Bank,* 83 L. Ed. 771, 774.)

These findings of fact, conclusions of law and final decree so rendered by the court of primary jurisdic-

tion in the original class suit were entitled to full faith and credit under Article IV of the Federal Constitution and recognition thereof could not be denied even if they contravened the public policy of California. This rule, first declared by Chief Justice Marshall, is restated in *Roche v. McDonald,* 275 U. S. 449, 72 L. Ed. 365. As to all rights and matters directly or collaterally involved in the original class suit commenced by Gallegos and others we submit that the decree was binding and entitled to full faith and credit in California. The Building and Loan Commissioner and Treasurer of that state possess no greater or different rights than the California investors. They are merely privies by operation of law. The deposit of $100,000 in California did not divest the Association of title thereto. (*U. S. v. Knott,* 298 U. S. 543, 80 L. Ed. 1321) Hence, when the Association answered to the original class suit, the District Court of Arizona obtained jurisdiction of the parties, the subject matter and to make the final decree adjudging rights of all represented to the funds of the Association.

POINT B

In holding that it was unnecessary to determine the truth or falsity of the allegations in petitioner's pleadings to the effect that the securities on deposit in California represented the fruits of trust funds belonging to petitioners and that petitioners were entitled to a return or distribution of the securities to satisfy their existing contract liens, the Circuit Court of Appeals has decided an important question of Federal law which appears not to have been and should be settled by this Court.

The primary purpose of the suit against the Building and Loan Commissioner and Treasurer of California was not to obtain the appointment of a receiver. The appointment of a receiver was merely ancillary or in aid of the main purpose of the suit. The fundamental and basic purpose of the bill was to enforce and secure the contract lien rights of petitioners and to prevent a preferential distribution of funds pledged by the Association without petitioner's knowledge and in breach of their trust. Petitioners were not made parties to the proceedings instituted by the Building and Loan Commissioner in the Superior Court of Los Angeles County and they did not appear therein. They could not be bound by any proceedings had by that tribunal, and their trust fund rights could not be divested or determined in their absence. When petitioners commenced their suit in the United States District Court for the Southern District of California, Central Division, and obtained a restraining order, the Lamberson decree had already been made by the Superior Court of Los Angeles County directing a

preferential distribution to California investors in disregard of the contract lien and trust rights of petitioners. Since petitioners were not parties to that suit they had no remedy by way of appeal. The sole remedy available to petitioners was by way of a bill of complaint in the United States District Court to maintain their status quo to the end that ultimately their trust rights and lien upon the funds in question might be preserved. It would have been a futile thing to urge in the Superior Court of Los Angeles County in the proceedings initiated by the Building and Loan Commissioner that the California Act was unconstitutional and that the funds in question were deposited while the Association was insolvent and that such funds were impressed with a trust in favor of petitioners. The California Act provides only for the appearance of stockholders and investors in the ordinary sense of the word and affords no remedy or procedure for those who assert that the fund sought to be distributed is a trust fund of which they are the express beneficiaries. It was not only proper but it was the duty of the United States District Court for the Southern District of California, Central Division, to pass upon these vital and basic issues. The allegations of petitioner's pleadings were such as to bring it fully within *Clark v. Darr* (Ind.), 80 N. E. 19, 9 L. R. A. (N.S.), 460, 4 R. C. L. 350; *Blake v. McClung,* 172 U. S. 239, 43 L. Ed. 432; *Torrington Co. v. Sidway-Topiff Co.* (C.C.A. 7), 70 Fed.(2d) 949.

POINT C

In holding that it was unnecessary to determine whether or not the Building and Loan Association Act of California violated the Fourteenth Amendment to the Constitution of the United States and impaired the contract lien rights of those investors who were not residents of California, the Circuit Court of Appeals has decided an important question of Federal law probably in conflict with applicable decisions of this Court.

The contract rights of those investors in the Association whose respective certificates bore the security clause were directly and substantially impaired by giving effect to the Building and Loan Association Act of California. The decision of the Circuit Court of Appeals directly contravenes the doctrine announced in *Treigle v. Acme Homestead Assn.*, 297 U. S. 189, 80 L. Ed. 575. In our argument upon the preceding Point B, we have set forth the reasons why a proper determination of this vital point could not have been had in the Circuit Court of Los Angeles County and why it was not only proper but essential that such determination be made in the District Court of the United States for the Southern District of California, Central Division. Such argument is expressly adopted for the purposes of Point C.

CONCLUSION

WHEREFORE, your petitioners respectfully pray that Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, the full and complete transcript of the record and all proceedings in the case entitled "Julius G. Brashear, et al. v. Intermountain Building & Loan Association, et al.", and that said judgment of the Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

JULIUS G. BRASHEAR, CHARLES E. GRIGGS and MRS. CHARLES E. GRIGGS, his wife (in their own behalf and in behalf of others similarly situated), and HARRY W. HILL, Receiver of Intermountain Building & Loan Association, an Utah corporation, Petitioners,

By THOMAS W. NEALON,
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Attorneys for Petitioners.

LOUIS B. WHITNEY,
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Of Counsel.

(Appendix follows)

Appendix

Sec. 644 of the California Civil Code as in effect prior to 1931 (superseded in 1931 by Sec. 1.01 of the Building and Loan Association Act):

> "All building and loan associations, as in this title defined, doing business in this state, shall be under the supervision and control of such official or officials as are by law vested therewith; and except in the manner provided in this title, no corporation, firm, or association shall conduct or carry on the business of accumulating the savings of its shareholders, members, or investors, and loaning such accumulations to them, in the manner of building and loan associations."

Sec. 646 of the California Civil Code as in effect prior to 1931 (superseded in 1931 by Sec. 12.04 of the Building and Loan Association Act):

> "No building and loan association or other corporation, association or society organized under and by virtue of the laws of any other state or territory or of any foreign country, for the purpose of conducting and carrying on a business of a character similar to that authorized by this title, or whose by-laws, rules, prospectus, contracts or methods of business provide for the conducting or carrying on the business of accumulating the periodical payments or savings of its shareholders, members or investors in the manner of building and loan associations, or as authorized and provided in this title, shall enter the State of California for the transaction of business or for sell-

ing its bonds, debentures, certificates, shares of stock, shares of membership, contracts or other similar securities or otherwise transact any of its business of a character similar to that authorized by this title, without first complying with all the requirements of the laws of this state relative to building and loan associations as defined in this title and in an act entitled 'The building and loan commission act,' approved April 5, 1911, and acts amendatory thereof and supplemental thereto, and until such building and loan association, corporation or society has applied for and received from the building and loan commissioner a certificate of authority or license to transact business in this state as required of building and loan associations organized under the laws of this state, and without having deposited with the building and loan commissioner the money or securities hereinafter in this section required for the transaction of such business within this state. Every such foreign building and loan association, corporation or society transacting business in this state of a character similar to that authorized by this title, or in such a manner as might lead the public to believe that its business is that of a building and loan association, shall become subject to the supervision of the building and loan commissioner, and shall conduct all its business in accordance with the statutes governing building and loan associations organized under the laws of this state.

Every building and loan association, and every other corporation, association or society organized under and by virtue of the laws of any other state

or territory or of any foreign country, for the purpose of conducting and carrying on a business of a character similar to that authorized by this title, or whose by-laws, rules, prospectus, contracts or methods of business provide for the conducting or carrying on the business of accumulating the periodical payments or savings of its shareholders, members or investors in the manner of building and loan associations, or as authorized and provided in this title, desiring to enter the State of California for the transaction of business or for selling its bonds, debentures, certificates, shares of stock, shares of membership, contracts, or other similar securities, must first deposit with the building and loan commissioner not less than fifty thousand dollars in lawful money of the United States or in bonds of the United States or of the State of California, or of any county, municipality or school district of said state, or of any public utility corporation, or of any irrigation district in said state, the bonds issued by which district are legal investments for savings banks or any notes or bonds secured by mortgage or deed of trust payment of which is guaranteed by a policy of mortgage insurance, or mortgage participation certificates, issued by a mortgage insurance company in accordance with the provisions of chapter eight, title two, part four of division first of the Civil Code or in lieu thereof promissory notes secured by first mortgages or deeds of trust upon unencumbered real estate located within this state, satisfactory to the building and loan commissioner, all duly assigned or endorsed in blank, to be held by him as a guarantee fund for the protection and indem-

nity of residents of the State of California who shall invest in any of its bonds, debentures, shares, contracts, agreements or other securities, or with whom it shall do business.

With the consent of the building and loan commissioner any of the securities deposited as herein provided may be withdrawn at any time upon the substitution and deposit of others of form and character herein specified and of like or greater net value, so long as the aggregate net convertible value of all equals or exceeds the amount named herein. The fund thus created is not to be foreclosed or realized upon except for the liquidation of a final judgment in favor of residents of California who were investors in any of the above mentioned securities of such foreign association, corporation or society, and then only after certified proof thereof has been filed with the custodian.

Except as above provided, securities deposited as herein specified shall not be withdrawn until satisfactory proof of the liquidation of all liabilities to residents of California, approved by the building and loan commissioner, shall be filed with the custodian, when all may then be withdrawn.

Any person who shall be found in the state, as principal, agent, solicitor, or in any other capacity, soliciting or conducting the business of selling, disposing of, or taking or soliciting subscriptions for the sale of any of the forms of bonds, debentures, shares, contracts, agreements or other securities of any such foreign company, corporation or association which has not complied

with all the requirements of this section and which is not at that time the lawful holder of a license to transact business in this state, issued by the building and loan commissioner, and then in force, shall be deemed guilty of a misdemeanor, punishable, upon conviction, by a fine of net less than one hundred dollars nor more than one thousand dollars or by imprisonment in the county jail for not less than one month nor more than twelve months, or by both such fine and imprisonment."

Sec. 12.04 of the California Building and Loan Association Act as adopted effective August 14, 1931 and as amended effective September 15, 1935:

"Sec. 12.04. Foreign Associations. No foreign association formed for the purpose of conducting and carrying on a business similar to that authorized by this act, or whose by-laws, rules, prospectus, contracts or methods of business provide for the conducting or carrying on the business of accumulating the periodical payments or savings of its shareholders, stockholders, members or investors in the manner of associations, or as authorized and provided in this act, shall enter the State of California for the transaction of business or for selling its shares, stock, and investment certificates or shall sell any of its shares, stock, or investment certificates, or otherwise transact any of its business of a character similar to that authorized by this act unless it shall have first (a) complied with all the requirements of the laws of this State relative to associations as defined in this act and acts amendatory hereof and

supplemental hereto, and (b) applied for and received from the commissioner a license to transact business in this State as required of a domestic association, and (c) deposited with the State Treasurer the money or securities hereinafter in this section required for the transaction of such business within this State. Every such association transacting business in this State of a character similar to that authorized by this act or in such manner as might lead the public to believe that its business is that of a building and loan association shall become subject to the supervision of the commissioner and shall conduct all its business in accordance with the statutes governing domestic associations.

Every foreign association mentioned or referred to in the preceding paragraph of this section desiring to enter the State of California for the transaction of business or for selling its shares, stock or investment certificates must first deposit with the State Treasurer not less than one hundred thousand dollars in lawful money of the United States, or in bonds or other securities referred to in subdivisions (3), (4) and (5) of section 9.02 of this act, or in lieu thereof promissory notes in such amount secured by first mortgages or first deeds of trust upon improved real property located in this State satisfactory to the commissioner, all duly assigned or endorsed in blank, to be held by him as a guarantee fund for the protection and indemnity of residents of this State who shall invest in any of its shares, stock or investment certificates, or with whom it shall do business. In the event mortgages or deeds of

trust shall be deposited, the association shall be required to make all collections thereon, and to do such acts as may be necessary or proper to protect and preserve the security therefor, and shall make monthly reports to the commissioner of the status thereof. Whenever any foreign association shall have outstanding shares and investment certificates issued to residents of this State of an aggregate value in excess of two million dollars, the deposit above mentioned, in money or security of the character above mentioned, shall be increased and at all times maintained in a sum at least equal to five per cent of such aggregate value. With the consent of the commissioner, any of the securities deposited as herein provided may be withdrawn at any time upon the substitution and deposit of others of the form and character herein specified and of like or greater net value, so long as the aggregate net value of all equals or exceeds the amount named herein. The fund thus created is not to be foreclosed or realized upon when the association is not in the hands of the commissioner, except for the liquidation of a final judgment in favor of residents of California who were investors in such association or with whom it shall have done business, and then only after certified proof thereof has been filed with the State Treasurer. Where the association is in the hands of the commissioner for liquidation as provided for by this act, the fund may be withdrawn by the commissioner at any time for distribution by him in favor of residents of California who were investors of such association or with whom it shall have done business. Except as above

provided, securities deposited as herein specified shall not be withdrawn until satisfactory proof of the liquidation of all liabilities to residents of this State, approved by the commissioner, shall be filed with the State Treasurer, when all may then be withdrawn. Only those persons who have resided in the State of California continuously from the time of investing in or doing business with such association to the time of securing a final judgment or to the determination by the commissioner to liquidate such association, shall be entitled to participate in the fund provided for by this section.

Any person who, as principal, agent, salesman, solicitor or in any other capacity, shall solicit or conduct in this State the business of selling, disposing of or taking or soliciting subscriptions for the sale of any of the shares, stock, or investment certificates of any foreign association which has not complied with all the requirements of this section and which is not at that time the lawful holder of a license to transact business in this State, issued by the commissioner and then in force shall be guilty of a public offense and shall be punished by imprisonment in the State prison not exceeding five years, or in a county jail not exceeding two years, or by a fine not exceeding five thousand dollars, or by both such fine and imprisonment.

No foreign association issuing any securities other than shares, stock and investment certificates shall be entitled to a license to transact business in this State and no foreign association transacting business in this State shall issue any

securities except shares, stock and investment certificates. The term 'securities', as used in this paragraph shall not include borrowings permitted by sections 9.05 or 9.06 of this act or instruments executed in connection therewith."

Due service and receipt of a copy of the within is hereby admitted this_____day of May, 1940.

_____

Attorney for Respondents

SEP 18 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939. 1940

No. 80

JULIUS G. BRASHEAR, CHARLES E. GRIGGS and MRS. CHARLES E. GRIGGS, his wife, in their own behalf and in behalf of others similarly situated, and HARRY W. HILL, Receiver of Intermountain Building & Loan Association, a corporation, successor to HENRY S. MCCLUSKEY, and GEORGE A. MAUK, Receivers of Intermountain Building & Loan Association, a corporation, *Petitioners*,

v.

INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, a corporation, CHARLES G. JOHNSON, State Treasurer of California, and RALPH W. EVANS, Successor to JUSTUS F. CRAEMER, Building and Loan Commissioner of California, *Respondents*.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

OPINION OF THE COURT BELOW.

The Circuit Court of Appeals rendered an opinion which is reported in 109 Fed. (2nd) 857-863.

JURISDICTION.

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938), and under Rule 38 of the Revised Rules of this Court. The date of the decree sought to be reviewed is February 20, 1940. Motion for rehearing was denied on April 9, 1940.

STATUTES INVOLVED.

The pertinent portions of the statutes involved are set forth in the Appendix, *infra*, pp. 12-19.

STATEMENT.

Intermountain Building and Loan Association was incorporated in Utah in 1921, as a building and loan association. Thereafter, the Association gradually expanded its business throughout a number of the western states. In 1927 the Board of Directors determined to seek a license to transact its business in the state of California (R. 566) and on April 13, 1927, transmitted to the Commissioner and to the Secretary of State, various documents required under the Building and Loan Act, including, among other papers, a certified copy of a Report of Examination made as of March 9, 1927, by the Banking Commissioner of the State of Utah (R. 571-685). On April 21, 1927, pursuant to the then requirements of section 646 of the California Civil Code (see Appendix) the Association transmitted to the Commissioner a certificate of deposit, in the sum of fifty thousand dollars ($50,000.00) (R. 696), for the protection and indemnity of California residents who should invest therein or with whom the Association should do business, upon receipt of which the Commissioner on April 25, 1927, forwarded to the Association its license for the balance of the calendar year 1927 (R. 697).

On August 14, 1931, a new and comprehensive Building and Loan Association Act was adopted, section 12.04 of

which required foreign associations to deposit a minimum of one hundred thousand ($100,000.00) dollars for the protection and indemnity of California residents instead of the fifty thousand ($50,000.00) dollars previously required, as a condition to doing business in this state and on August 13, 1931, the Association was notified by letter (R. 703-704) of the impending change in the law. On September 10, 1931 (R. 707) the Association deposited with the Commissioner a cashier's check for fifty thousand ($50,000.00) dollars, bringing the total amount of the deposit to the one hundred thousand ($100,000.00) dollar minimum required by the New Act.

Later, the Association got in difficulties and on April 18, 1933, a suit for money was commenced against the Association in the Federal District Court for Arizona by certain of its Arizona investors entitled *Guadalupe R. Gallegos, et al.* v. *Intermountain Building and Loan Association*, No. E-268 (R. 473). Neither the California Commissioner, the State Treasurer, or any California resident ever became, or were made parties to that proceeding (R. 151). There was a prayer in the complaint for an appointment of a receiver for the corporation's property in Arizona (R. 794).

In October of 1933 the California Commissioner ordered the Association not to accept any more payments from California investors (R. 447) and ordered the State Treasurer to discontinue remittance of interest coupons to the Association on the bonds held for the protection of California investors (R. 448).

On March 17, 1934, John A. Malia, Banking Commissioner of Utah, took possession of the business, property and assets of the Association located in Arizona and Utah. On March 19, 1934, Charles H. Carey, the Oregon Corporation Commissioner took possession in that state and on March 29, 1934, Friend W. Richardson, the then California Building and Loan Commissioner took possession of the assets in California (R. 474).

In the meanwhile the *Gallegos* case had lain dormant, but on April 4, 1934, the plaintiffs in that case applied to the Court for an order appointing a receiver to take possession of the assets in *Arizona* (R. 475) and on April 20, 1934, Henry S. McCluskey was appointed receiver *pendente lite* "of all personal and real property of every kind and character of the said defendant, Intermountain Building and Loan Association, a corporation, *situated in the state of Arizona, or which was situated in the state of Arizona at the time of the filing of the bill of complaint in this suit*" (R. 1033). (Italics ours)

John A. Malia, the Utah Banking Commissioner, appealed from said order appointing a receiver and also from an order refusing permission to him to intervene in the suit (R. 476).

Both orders mentioned above were affirmed by the Ninth Circuit Court of Appeals and certiorari was denied by the United States Supreme Court on November 11, 1935 (R. 477). In the meantime, however, the Utah Commissioner had remained in possession and control of the assets in Arizona under a supersedeas bond (R. 1056) and it was not until December 2, 1935, that the Arizona assets were turned over to the receiver appointed in the *Gallegos* case. On February 8, 1936, the order of April 20, 1934, appointing a receiver for the Arizona property was "affirmed and made permanent" (R. 512-513).

Long before this, on May 5, 1934, the California Commissioner had determined to liquidate the California assets (R. 480), and gave notice to those having claims to file the same (R. 481).

The assets in California consisted of (1) the $100,000.00 fund deposited for the protection of California investors, (R. 708-710) and (2) general unpledged assets consisting of 8 parcels of real estate, two notes secured by mortgages on California property, and a small amount of cash (R. 547).

On August 21, 1935, the California Commissioner filed a petition with the Superior Court of the State of California

in and for the County of Los Angeles asking for instructions with reference to the distribution of the California assets (R. 711-744). The petition was set down for hearing and heard on October 1, 1935, upon notice fixed by the Court pursuant to provisions of the Building and Loan Association Act (R. 563, 744-746).

John A. Malia, the Utah Commissioner, who was still in charge of the Association and its assets, except in Oregon and California, but including those in Arizona, was notified of the hearing and submitted to the jurisdiction of the Court by filing an answer and cross-petition (R. 747-754) and appearing by counsel at the hearing. Numerous other investors likewise appeared in the proceeding (R. 564) and after argument the petition was taken under submission and on December 28, 1935, the Court made and entered its order (R. 564, 755-759) instructing and directing the California Commissioner to distribute the guarantee fund to California residents entitled to protection under the terms of the Building and Loan Association Act, to the extent of amounts paid in while residing in California, with interest at the legal rate from March 29, 1934.

On February 26, 1936, and within the time within which an appeal might have been taken from the order of December 28, 1935, the Arizona receiver, who had then replaced the Utah Commissioner as to the assets in Arizona, joined with other investors who were nonresidents of California to bring the present proceeding for the appointment of ancillary receivers to liquidate all assets located in California and to enjoin the California Commissioner from distributing the $100,000.00 guarantee fund pursuant to the state statutes and the Superior Court order.

Thereafter, but not until January 5, 1937, the final decree was entered in the *Gallegos* case. The instant case came on for trial in November, 1937. The District Court determined that the California Building and Loan Commissioner had the right and duty to liquidate all of the assets in California and to distribute them pursuant to state law and that no

receivership was necessary in California (R. 146-148). The Court further determined that all of the provisions of the California Building and Loan Association Act involved were constitutional, that the deposits required by law for the protection of California investors as a condition to transaction of business in California by the Association were legally made, that the Association was not insolvent when the deposits were made, that the Commissioner had no knowledge of any insolvency or of any acts which showed insolvency or which if investigated would have disclosed insolvency, and that the decision in the *Gallegos* case was not *res adjudicata* as to any rights of the Building and Loan Commissioner or the State Treasurer (R. 146-148).

Pursuant to said Decision and the Findings of Fact and Conclusions of Law, (R. 149-154) the Court made and entered a decree dissolving the temporary restraining order theretofore in effect and denying any relief to the plaintiffs either by way of an injunction or the appointment of ancillary receivers or otherwise (R. 173-174). Upon an appeal by plaintiffs from this decree the Circuit Court affirmed the decree of the District Court but vacated Findings of Fact I, II, and III (R. 149) and Conclusion of Law I (R. 153) as unnecessary to the decision (R. 1165).

At the time of trial Justus F. Craemer was the California Building and Loan Commissioner. He was succeeded by Ralph W. Evans who was, on November 1, 1939, substituted in his official capacity as a party to the case for and in the place of Justus F. Craemer. (R. 1149.)

QUESTIONS PRESENTED.

The statement of questions presented as brought forward by petitioners is as follows (Pet. 8):

> "(1) Are the findings of fact, conclusions of law and decrees as made by the United States District Court for the District of Arizona in the original class suit with respect to the period over which the Association

was insolvent, the right and title of the receiver to the assets and the trust character thereof, res judicata as to the California investors and their privies, and hence entitled in California to full faith and credit under Article IV of the Constitution of the United States?

"(2) Were petitioners entitled to a determination of whether the California Building and Loan Act is unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States on the basis that it abridges their privileges as investors in the Association and impairs the obligations of their several contracts and deprives them of their property without due process of law?"

ARGUMENT.

Although Petitioners' Brief in support of their Petition covers some additional ground, only the two questions noted above are specifically brought forward in the Petition for consideration. Under the rule (Rules of the Supreme Court, Rule 38, (2)) only these specific questions may be considered and accordingly the argument by respondents will be addressed directly to the two questions stated in the Petition.

I.

The decision of the Circuit Court of Appeals that the findings, conclusions, and decree in the *Gallegos* case were not res judicata as to the parties or with respect to the issues involved in the instant case is not in conflict with applicable decisions of this Court, and no important question of local or federal law is involved in the Circuit Court's disposition of the issue.

Petitioners insist that a conflict exists. The cases cited by them obviously fail to sustain the contention. We do not quarrel with any principle announced in the cases relied upon.

It is of course true, as stated in *Hartford Livestock Insurance Co.* v. *Ibs*, that a decree rendered in a class suit is binding upon other members of the same class where those who were not parties to the proceedings "had an interest that was in fact similar", 237 U. S. 662, 672, 59 L. Ed. 1165.

No one would deny the soundness of the declaration in *Roche* v. *McDonald*, 275 U. S. 449, 72 L. Ed. 365, that a judgment of a state court which has jurisdiction over the parties and over the subject matter should have the same credit, validity and effect in the courts of other states as in the state where rendered.

The decision of the Circuit Court is not in conflict with those or other decisions cited by petitioners in any particular whatsoever.

The defense of res judicata was disposed of by both the District Court and by the Circuit Court of Appeals in absolute harmony with these cases. The decision of the Circuit Court on this point rests upon the factual ground (strictly within the Findings of Fact by the District Court R. 152) that neither the identity of subject matter nor the identity of parties necessary to support the plea of res judicata had been established. Nothing said in any one of the cases relied upon by the petitioners casts the slightest doubt on the soundness of the Court's determination of these factual issues. In fact, the decision of the Circuit Court is in strict accord with the decisions of the Supreme Court.

In holding (R. 1163) that the appointment of a receiver by the District Court for Arizona did not have and could not have had any extraterritorial effect with respect to the properties located in the State of California, the Court soundly followed the rule applied in *Great Western Mining & Mfg. Co.* v. *Harris*, 198 U. S. 561, 574-578, 49 L. Ed. 1163, and *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 77, 79-85, 67 L. Ed. 871.

The Court was obviously correct in ruling as it did, that the situation of the Building and Loan Commissioner and

the State Treasurer of California and the situation of the named plaintiffs in the *Gallegos* suit were not similar, and that the facts and issues presented in connection with the two cases were entirely different and did not and could not support the plea of res judicata.

II.

The decision of the Circuit Court of Appeals that the question of the constitutionality of the state statute involved (as well as other questions in connection with the liquidation of the assets in California) should properly be left to determination by the state court is not in conflict with any decision of this Court but on the contrary precisely follows the now well-established principles laid down in a number of decisions by this Court, including, among others, the following,

Pennsylvania v. *Williams*, 294 U. S. 176, 182-186; 79 L. Ed. 841.
Gordon v. *Ominsky*, 294 U. S. 186, 188; 79 L. Ed. 848.
Gordon v. *Washington*, 295 U. S. 30, 36-40; 79 L. Ed. 1282.
United States v. *Bank of New York Company*, 296 U. S. 463, 475-479; 80 L. Ed. 331.

These cases clearly lay down the rule that where, as in this case, the statutory procedure is adequate and has been honestly and diligently followed, the federal court will properly refuse to appoint receivers or otherwise interfere with the administration of state supervisory statutes by state officials. Questions with respect to the interpretation of particular provisions of such statutes and their constitutionality are properly left to the State Courts for decision.

Ample opportunity was afforded to the Arizona receiver and his co-plaintiffs in this suit to assert their contentions in the State Court. The statement on page 18 of petitioners' brief, that "the California Act provides only for the appearance of stock-holders and investors in the ordinary sense of the word, and affords no remedy or procedure for

those who assert that the fund sought to be distributed is a trust fund of which they are the express beneficiaries" is not borne out by the facts. No portion of the California Building and Loan Association Act purporting to make such a distinction is referred to or quoted by petitioners in their brief or the appendix. No such provision is referred to by the Court in its opinion. Respondents are aware of no such distinction, and assert that none exists.

None of the cases cited by the petitioners support the proposition that the question of constitutionality should have been passed upon by the Circuit Court. The cases cited simply hold that particular statutes, differing substantially from any before the Court in the case at bar, were unconstitutional. The question whether the issue of constitutionality should have been left to a State Court for decision under circumstances similar to those at hand is not considered, or even referred to, in any one of the cases cited.

The California statute is unquestionably constitutional[1]

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[1] The rule is a familiar one and it has been held in numerous cases that a corporation organized in one State has no right to do business in any other State except with the consent of such other State, which, therefore, has the right either to entirely prohibit the foreign corporation from doing business within the State or, the right to permit the transaction of business only upon such terms and conditions as the State may see fit to impose (see the discussion of this rule in 14-a *C. J.* 1244, section 3948 *et seq.*).

One of the conditions which a State may lawfully impose by statute is that the foreign corporation desiring to do business in the State shall first deposit with State authorities money or securities for the protection of residents of the State with whom the corporation may do business. It is further held that irrespective of the possibility of any particular statute being unconstitutional, the objection is waived where the corporation elects to accept the benefits of the statute and does comply with the condition imposed and thereafter transacts business within the State, the rule being that if the statute is to be attacked on constitutional grounds, action must be taken before the corporation comes into the State. Some of the principal authorities upholding statutes such as the one involved here are:

Brady v. *Mattern* (Iowa), 106 Am. St. Rep. 291, 100 N. W. 358;

but, even if there were doubt as to that, the question now before the Court is whether the Circuit Court was correct in declaring that the argument against the statute was one to be presented in the State Court under the circumstances presented by the record. On that question, as we have shown, there is no conflict whatsoever between the decision of the Circuit Court and the decisions of this Court.

CONCLUSION.

The decision of the Court below was correct. There exists no conflict and no questions of substantial importance are raised by the petition. We therefore, respectfully submit that the petition for a writ of certiorari be denied.

JAMES C. INGEBRETSEN,
Attorney for Ralph W. Evans as successor to Justus F. Craemer, Building and Loan Commissioner of California,

EARL WARREN,
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Deputy Attorney General,

Attorneys for Charles G. Johnson, State Treasurer of California, Respondents.

September, 1940.

Lewis v. *American Savings & Loan* (Wis.), 73 N. W. 793, 39 L. R. A. 559;
Bank Commissioners v. *Granite State Provident Assn.* (N. H.), 85 A. S. R. 646; 49 Atl. 124;
Irwin v. *Granite State Provident Assn.* (N. J.), 38 Atl. 680;
People v. *Granite State Provident Assn.* (N. Y.), 55 N. E. 1053;
Phillips v. *Perue* (Tex.), 229 S. W. 849;
Phillips, In re (N. Y.), 200 N. Y. S. 639;
Dailey v. *Federal Building & Loan*, 1 Fed. Supp. 231;
Clark v. *Williard*, 292 U. S. 112, 78 L. Ed. 1160; 294 U. S. 211, 79 L. Ed. 865;
Kelly v. *Knott* (Fla.), 163 So. 64, 298 U. S. 544, 80 L. Ed. 1321, 104 A. L. R. 741 (and note), 56 S. Ct. 902.

APPENDIX.

Sec. 644 of the California Civil Code as in effect prior to 1931 (superseded in 1931 by Sec. 1.01 of the Building and Loan Association Act):

"All building and loan associations, as in this title defined, doing business in this state, shall be under the supervision and control of such official or officials as are by law vested therewith; and except in the manner provided in this title, no corporation, firm, or association shall conduct or carry on the business of accumulating the savings of its shareholders, members, or investors, and loaning such accumulations to them, in the manner of building and loan associations."

Sec. 645 of the California Civil Code as in effect prior to 1931 (superseded in 1931 by Sec. 10.04 and 10.05 of the Building and Loan Association Act):

"Every association organized under the provisions of this title, and every other association doing a similar business, shall annually make a full report, in writing, of the affairs and condition of such corporation, within thirty days after its annual meetings, to the official or officials vested with powers of state supervision and license. Such reports shall be verified by the oath of the officers making the same, and a copy of the same shall be delivered to every stockholder, from the office of the corporation, who may call for such report. Every association shall make any further reports which the said official or officials may require, and in such form and as to such matters relating to the conduct of the business of the association as such official or officials may designate. Any wilfully false statement in making and verifying said report shall be perjury. Any such association which shall fail to furnish the said official or officials any such report required, within thirty days after demand, shall forfeit the sum of ten dollars per day for every day such report shall be delayed or withheld,

which may be recovered in an action brought by the attorney general in the name of the people of this state; and all moneys so recovered shall be paid to the treasurer of this state, who shall pay the same into such fund as may be provided by law, for the purposes of the official or officials vested with power of supervision and license."

Sec. 646 of the California Civil Code as in effect prior to 1931 (superseded in 1931 by Sec. 12.04 of the Building and Loan Association Act):

"No building and loan association or other corporation, association or society organized under and by virtue of the laws of any other state or territory or of any foreign country, for the purpose of conducting and carrying on a business of a character similar to that authorized by this title, or whose by-laws, rules, prospectus, contracts or methods of business provide for the conducting or carrying on the business of accumulating the periodical payments or savings of its shareholders, members or investors in the manner of building and loan associations, or as authorized and provided in this title, shall enter the State of California for the transaction of business or for selling its bonds, debentures, certificates, shares of stock, shares of membership, contracts or other similar securities or shall sell any of its bonds, debentures, certificates, shares of stock, shares of membership, contracts or other similar securities or otherwise transact any of its business of a character similar to that authorized by this title, without first complying with all the requirements of the laws of this state relative to building and loan associations as defined in this title and in an act entitled 'The building and loan commission act,' approved April 5, 1911, and acts amendatory thereof and supplemental thereto, and until such building and loan association, corporation or society has applied for and received from the building and loan commissioner a certificate of authority or license to transact business in this state as required of building and loan

associations organized under the laws of this state, and without having deposited with the building and loan commissioner the money or securities hereinafter in this section required for the transaction of such business within this state. Every such foreign building and loan association, corporation or society transacting business in this state of a character similar to that authorized by this title, or in such a manner as might lead the public to believe that its business is that of a building and loan association, shall become subject to the supervision of the building and loan commissioner, and shall conduct all its business in accordance with the statutes governing building and loan associations organized under the laws of this state.

Every building and loan association, and every other corporation, association or society organized under and by virtue of the laws of any other state or territory or of any foreign country, for the purpose of conducting and carrying on a business of a character similar to that authorized by this title, or whose by-laws, rules, prospectus, contracts or methods of business provide for the conducting or carrying on the business of accumulating the periodical payments or savings of its shareholders, members or investors in the manner of building and loan associations, or as authorized and provided in this title, desiring to enter the State of California for the transaction of business or for selling its bonds, debentures, certificates, shares of stock, shares of membership, contracts, or other similar securities, must first deposit with the building and loan commissioner not less than fifty thousand dollars in lawful money of the United States or in bonds of the United States or of the State of California, or of any county, municipality or school district of said state, or of any public utility corporation, or of any irrigation district in said state, the bonds issued by which district are legal investments for savings banks or any notes or bonds secured by mortgage or deed of trust payment of which is guaranteed by a policy of mortgage insurance, or mortgage

participation certificates, issued by a mortgage insurance company in accordance with the provisions of chapter eight, title two, part four of division first of the Civil Code or in lieu thereof promissory notes secured by first mortgages or deeds of trust upon unencumbered real estate located within this state, satisfactory to the building and loan commissioner, all duly assigned or endorsed in blank, to be held by him as a guarantee fund for the protection and indemnity of residents of the State of California who shall invest in any of its bonds, debentures, shares, contracts, agreements or other securities, or with whom it shall do business.

With the consent of the building and loan commissioner any of the securities deposited as herein provided may be withdrawn at any time upon the substitution and deposit of others of form and character herein specified and of like or greater net value, so long as the aggregate net convertible value of all equals or exceeds the amount named herein. The fund thus created is not to be foreclosed or realized upon except for the liquidation of a final judgment in favor of residents of California who were investors in any of the above mentioned securities of such foreign association, corporation or society, and then only after certified proof thereof has been filed with the custodian.

Except as above provided, securities deposited as herein specified shall not be withdrawn until satisfactory proof of the liquidation of all liabilities to residents of California, approved by the building and loan commissioner, shall be filed with the custodian, when all may then be withdrawn.

Any person who shall be found in the state, as principal, agent, solicitor, or in any other capacity, soliciting or conducting the business of selling, disposing of, or taking or soliciting subscriptions for the sale of any of the forms of bonds, debentures, shares, contracts, agreements or other securities of any such foreign company, corporation or association which has not complied with all the require-

ments of this section and which is not at that time the lawful holder of a license to transact business in this state, issued by the building and loan commissioner, and then in force, shall be deemed guilty of a misdemeanor, punishable, upon conviction, by a fine of not less than one hundred dollars nor more than one thousand dollars or by imprisonment in the county jail for not less than one month nor more than twelve months, or by both such fine and imprisonment."

Sec. 12.04 of the California Building and Loan Association Act as adopted effective August 14, 1931 and as amended effective September 15, 1935:

"Sec. 12.04. Foreign Associations. No foreign association formed for the purpose of conducting and carrying on a business similar to that authorized by this act, or whose by-laws, rules, prospectus, contracts or methods of business provide for the conducting or carrying on the business of accumulating the periodical payments or savings of its shareholders, stockholders, members or investors in the manner of associations, or as authorized and provided in this act, shall enter the State of California for the transaction of business or for selling its shares, stock, and investment certificates or shall sell any of its shares, stock, or investment certificates, or otherwise transact any of its business of a character similar to that authorized by this act unless it shall have first (a) complied with all the requirements of the laws of this State relative to associations as defined in this act and acts amendatory hereof and supplemental hereto, and (b) applied for and received from the commissioner a license to transact business in this State as required of a domestic association, and (c) deposited with the State Treasurer the money or securities hereinafter in this section required for the transaction of such business within this State. Every such association transacting business in this State of a character similar to that authorized by this act or in such

manner as might lead the public to believe that its business is that of a building and loan association shall become subject to the supervision of the commissioner and shall conduct all its business in accordance with the statutes governing domestic associations.

Every foreign association mentioned or referred to in the preceding paragraph of this section desiring to enter the State of California for the transaction of business or for selling its shares, stock or investment certificates must first deposit with the State Treasurer not less than one hundred thousand dollars in lawful money of the United States, or in bonds or other securities referred to in subdivisions (3), (4) and (5) of section 9.02 of this act, or in lieu thereof promissory notes in such amount secured by first mortgages or first deeds of trust upon improved real property located in this State satisfactory to the commissioner, all duly assigned or endorsed in blank, to be held by him as a guarantee fund for the protection and indemnity of residents of this State who shall invest in any of its shares, stock or investment certificates, or with whom it shall do business. *In the event mortgages or deeds of trust shall be deposited, the association shall be required to make all collections thereon, and to do such acts as may be necessary or proper to protect and preserve the security therefor, and shall make monthly reports to the commissioner of the status thereof.* Whenever any foreign association shall have outstanding shares and investment certificates issued to residents of this State of an aggregate value in excess of two million dollars, the deposit above mentioned, in money or security of the character above mentioned, shall be increased and at all times maintained in a sum at least equal to five per cent of such aggregate value. With the consent of the commissioner, any of the securities deposited as herein provided may be withdrawn at any time upon the substitution and deposit of others of the form and character herein specified and of like or greater net value, so long as the aggregate net value of all equals or exceeds the amount

named herein. The fund thus created is not to be foreclosed or realized upon *when the association is not in the hands of the commissioner*, except for the liquidation of a final judgment in favor of residents of California who were investors in such association or with whom it shall have done business, and then only after certified proof thereof has been filed with the State Treasurer. *Where the association is in the hands of the commissioner for liquidation as provided for by this act, the fund may be withdrawn by the commissioner at any time for distribution by him in favor of residents of California who were investors of such association or with whom it shall have done business.* Except as above provided, securities deposited as herein specified shall not be withdrawn until satisfactory proof of the liquidation of all liabilities to residents of this State, approved by the commissioner, shall be filed with the State Treasurer, when all may then be withdrawn. *Only those persons who have resided in the State of California continuously from the time of investing in or doing business with such association to the time of securing a final judgment or to the determination by the commissioner to liquidate such association, shall be entitled to participate in the fund provided for by this section.*

Any person who, as principal, agent, salesman, solicitor or in any other capacity, shall solicit or conduct in this State the business of selling, disposing of or taking or soliciting subscriptions for the sale of any of the shares, stock, or investment certificates of any foreign association which has not complied with all the requirements of this section and which is not at that time the lawful holder of a license to transact business in this State, issued by the commissioner and then in force shall be guilty of a public offense and shall be punished by imprisonment in the State prison not exceeding five years, or in a country jail not exceeding two years, or by a fine not exceeding five thousand dollars, or by both such fine and imprisonment.

No foreign association issuing any securities other than shares, stock and investment certificates shall be entitled to a license to transact business in this State and no foreign association transacting business in this State shall issue any securities except shares, stock and investment certificates. The term "securities," as used in this paragraph, shall not include borowings permitted by sections *9.05 or 9.06* of this act or instruments executed in connection therewith." (Italics indicate 1935 amendments.)